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No. _____

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1992

DAVID J. ROUCH,
Petitioner,
v.
ENQUIRER AND NEWS
OF BATTLE CREEK, MICHIGAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

WHETHER IN A DEFAMATION ACTION BROUGHT BY A PRIVATE CITIZEN, THE FIRST AND FOURTEENTH AMENDMENTS REQUIRE AN APPELLATE COURT TO AFFORD NO DEFERENCE TO JURY FINDINGS OF FACT AND TO CONDUCT AN INDEPENDENT *DE NOVO* REVIEW OF THE ENTIRE RECORD TO DETERMINE WHETHER FALSE STATEMENTS WERE "MATERIALLY FALSE"?

II.

WHETHER PROOF THAT A PUBLICATION FALSELY ACCUSED A PRIVATE CITIZEN OF A CRIME HE DID NOT COMMIT, FALSELY STATED HIS CHILDREN WERE WITNESSES AGAINST HIM, AND FALSELY CLAIMED HE HAD BEEN CHARGED WITH A SEX CRIME IS INSUFFICIENT EVIDENCE, AS A MATTER OF LAW, TO OVERCOME THE PROTECTIONS OF THE FIRST AMENDMENT IN A DEFAMATION ACTION?

LIST OF PARTIES

The parties to the proceeding below were the petitioner, David J. Rouch, a private citizen, who was plaintiff in the court below and the respondent, Enquirer and News of Battle Creek, Michigan, a Delaware Corporation and publisher of the newspaper, the *Enquirer and News of Battle Creek*, who was defendant in the court below. There have been no other parties to this action.

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PETITION FOR WRIT OF CERTIORARI
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Petitioner, David J. Rouch, respectfully requests that a Writ of Certiorari issue to review the opinion of the Supreme Court of Michigan entered in this proceeding on July 15, 1992.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Michigan which is sought to be reviewed is published at 440 Mich. 238, and is reprinted in the Appendix, p. A-1. The opinion of the Michigan Court of Appeals is published at 184 Mich. App. 19, 457 N.W.2d 74, and is reprinted in the Appendix at p. A-165. The order of the trial court denying the defendant's motion for judgment n.o.v. and motion for new trial is unreported and is reprinted in the Appendix at p. A-163; the trial judge's statements of reasons for denying judgment n.o.v. and a new trial are unreported and are reprinted in the Appendix at p. A-151. A pre-trial decision of the Michigan Supreme Court in this case reversing summary judg-

ment for defendant was published at 427 Mich. 157, 398 N.W. 2d 245, and is reprinted in the Appendix at p. A-83. The pre-trial decision of the Michigan Court of Appeals reversing the granting of summary judgment to defendant is published at 137 Mich. App. 39, 357 N.W. 2d 794, and is reprinted in the Appendix at p. A-63. The order of the trial court granting summary judgment to defendant is unreported and is reproduced in the Appendix at p. A-59; the trial judge's statement of reasons for granting summary judgment are unreported and are reproduced in the Appendix at pp. A-57 and A-60.

JURISDICTION

The judgment of the Supreme Court of Michigan, the highest court of Michigan, was entered on July 15, 1992; a timely motion for rehearing was filed on August 5, 1992, and was denied by order dated August 24, 1992. This Petition for Certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law ... abridging the freedom of speech, or of the press ...

United States Constitution, Amendment XIV, § 1:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law ...

INTRODUCTION — SUMMARY OF ARGUMENT

This case presents squarely to this Court two unresolved and important questions that have caused conflict and confusion in the federal and state courts in defamation actions. When a private citizen obtains a verdict against a publisher: (1) does the First Amendment require an appellate court to conduct a *de novo* review of the entire record for sufficiency of evidence of falsity and (2) when is evidence of false statements insufficient, as a matter of law, to support a jury's verdict and to overcome a publisher's First Amendment protections?

The lower courts, including the Michigan Supreme Court in the opinion sought to be reviewed, have correctly noted that neither of these questions has been answered by this Court. In the breach, the Michigan Supreme Court has leaped in and fashioned its own rule based on the First Amendment. The Michigan Supreme Court has held that an appellate court must conduct a complete *de novo* review of the entire record in all defamation cases, including cases brought by private-figures, to determine whether evidence of false statements is sufficient to constitute "material falsity." This Constitutionally compelled rule of review, the Michigan Supreme Court held, requires no deference to any special verdict of a jury or a jury's factual finding of material falsity.

This decision of the Michigan Supreme Court is contrary to the decisions of other appellate courts who have reviewed defamation verdicts, have applied the First Amendment, and have afforded some deference to jury findings. See pp. 17-19 of this Petition. The decision of the Michigan Supreme Court is also contrary to the direct dictates of this Court in *Bose* v. *Consumers Union*, 466 U.S. 485, 514, n. 1, (1984) which rejected *de novo* review of the entire record, and *Harte-Hanks* v. *Connaughton*, 491 U.S. 657 (1989) which required a review of a jury's special findings with some deference to the jury. And the decision of the Michigan Supreme Court is even contrary to a previous decision of its own, wherein the court held that an independent review of evidence of falsity in a defama-

tion case should occur with an eye to whether the jury's verdict was against the great weight of the evidence. *Locricchio* v. *Evening News Assn.*, 438 Mich. 84, 112, 122, 476 N.W.2d 112 (1991), *cert. den.*, 112 S. Ct. 1267 (1991).

The decision of the Michigan Supreme Court also expands a federal rule of appellate review of public-figure defamation cases to private-figure cases, contrary to the policy suggested in *Gertz* v. *Welch*, 418 U.S. 323 (1974)

Since this Court's decision in *Philadelphia Newspapers* v. *Hepps*, 457 U.S. 767 (1986), which imposed upon a private-figure libel plaintiff the burden of proving falsity, this Court has not enunciated a standard by which an appellate court should review evidence of falsity in a private-figure defamation case for its sufficiency to strip First Amendment protections from a media defendant. Petitioner can discern no consistency among the lower courts in articulating a standard, and even the Michigan Supreme Court has abandoned its previous standard for review of evidence of falsity in a private-figure defamation case announced in *Locricchio* v. *Evening News Assn.*

In the absence of an articulated standard of appellate review of evidence of falsity or a standard for sufficiency of evidence of falsity, the danger exists that an appellate court will simply substitute its judgment for that of a jury on a question of fact, as the Michigan Supreme Court did in this case, and even though the plaintiff proved in the lower court that the publisher printed an article which falsely accused him of a crime he did not commit, falsely stated police information, falsely claimed that charges against him had been authorized, and falsely claimed he had been identified as a rapist by his own children, the appellate court may reject jury findings and find that these statements were not "materially false" as a matter of First Amendment law.

De novo review of the entire record for sufficiency of all the evidence of falsity in private-figure cases without a standard of review will result in trial on appeal in defamation cases and will lead to the creation of barriers to defamation

verdicts which are so high as to discourage the private figure from attempting to pursue a media defendant for defamation of his good name.

Petitioner is without remedy except in this Court.

STATEMENT OF THE CASE

I.

STATEMENT OF FACTS

In the early morning hours of Friday, December 21, 1979, David J. Rouch was roused from his bed in his home in Emmett Township, Michigan, by officers of the Emmett Township Police Department. Tr. 128-129.[1] The Emmett Township officers were picking up Rouch at the request of the Bedford Township Police Department, who suspected Rouch of a rape of his ex-wife's babysitter which had occurred that morning. Later that afternoon, Mr. Rouch would be released from the county jail without a court appearance and without being formally charged with rape. Tr. 134, 906. No charges were filed against Rouch; eventually, another man would be formally charged with criminal sexual conduct in the rape of the babysitter. p. A-199, Tr. 138.

Stan Kaufman, a reporter employed by the *Enquirer and News of Battle Creek*, began making "phone rounds" of the police departments at 8:00 a.m. on December 21, 1979. p. A-203. Kaufman was told by unidentified officers at Emmett Township and Bedford Township that Rouch had been arrested for rape. pp. A-203-204. Later that afternoon, Kaufman received information from the Prosecutor's

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[1] **References to the trial transcript of the trial in the Calhoun County, Michigan, Circuit Court, in February of 1988 will be indicated by "Tr." and the page number of the transcript. The transcript has been filed and is part of the lower court records; if a portion of the transcript has been reproduced in Petitioner's Appendix, the reference will be to the page number of the Appendix.**

Office in Calhoun County, Michigan, regarding Rouch's arrest, and he claimed he spoke to either Chief John Bell or Officer David Minier of the Bedford Township Police Department to confirm that he could publish information regarding Rouch's arrest. p. A-205. Both Chief Bell and Officer Minier denied talking to or releasing any information to Kaufman or anyone else at the *Enquirer*. pp. A-206-208, A-209-211. Both Officers cited a departmental policy not to release information about persons arrested but not formally charged. pp. A-207, A-210.

After his telephone calls, Kaufman prepared an article on the rape and Rouch's arrest that was left for editors to review to determine whether it should be published. The editors of the *Enquirer* chose to place an article in the Saturday morning edition on December 22, 1979, under the headline "Police Arrest Suspect in Babysitter Assault." See article reproduced in its entirety at p. A-198 of the Appendix. The article named Rouch, listed his address, and stated he had been arrested "and charged" with the sexual assault of a 17-year-old woman who was babysitting with "his children" at his ex-wife's house in Bedford Township. The article went on to state that Mr. Rouch was free "pending his arraignment" in court the following week. The article stated that Rouch was "charged with first degree criminal sexual conduct." The article went on to claim that Rouch "entered the house about 4:00 a.m. Friday and attacked the young woman. He is said to have used a knife to cut the victim's clothes off, police said." The article then went on to state that Mr. Rouch had been "identified by his children ... ."[2] The article concluded with the statement that "[t]he charge against Rouch was authorized Friday by the Calhoun County Prosecutor's Office."

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[2] **Rouch initially had been identified mistakenly by the two young children of Rouch's ex-wife and the babysitter as the ski-masked rapist on the basis of voice.**

The Respondent has conceded that Mr. Rouch had not been identified by his children as a rapist and that formal charges in the form of a warrant were never authorized by the prosecutor's office. Tr. 1031, 1036. No evidence was produced to suggest that Rouch was the rapist who entered his ex-wife's house and attacked her babysitter in front of her children. The *Enquirer* eventually ran a correction under "Setting it Straight" which is reproduced in its entirety in the Appendix at p. A-199. The correction noted that Mr. Rouch was "never formally charged in the case" and that police "later arrested another man who is being prosecuted for the crime." The second article confirmed that Mr. Rouch had not been charged by the prosecutor's office, because the prosecutor's office had insufficient proof and because the state police "had another suspect."

II.

PROCEDURAL HISTORY AND HISTORY OF FEDERAL QUESTION

A. Pretrial

David J. Rouch commenced a libel action against the defendant on December 5, 1980, in the Circuit Court for Calhoun County, Michigan, by filing a Complaint and demand for trial by jury. p. A-212. In his Complaint, the plaintiff alleged that the statements published by the defendant were "false and defamatory" and were made with disregard of his rights of "privacy and individual rights . . . ." The plaintiff asked for damages, both general and punitive, in the sum of $1,000,000.

On June 7, 1982, the trial judge granted the defendant's motion for summary judgment, holding that the plaintiff, though a private citizen, had to show "actual malice" on the part of the defendant since the report published was a matter of public concern. pp. A-57, A-60. The Michigan Court of Appeals reversed the trial court on September 4, 1984,

holding that the plaintiff need not prove malice in publishing the false statements, but only negligence. The defendant appealed to the Michigan Supreme Court. In its brief filed in the Michigan Supreme Court after the Court of Appeals decision of 1984, the defendant argued that the plaintiff's libel claim "is Constitutionally barred," claiming rights under the federal constitution. p. A-214. The Michigan Supreme Court affirmed the Court of Appeals, reversing the trial court's granting of summary judgment to the plaintiff, and remanded the cause for trial on December 26, 1986. The Michigan Supreme Court interpreted *Gertz* v. *Welch* and federal constitutional requirements in holding that Michigan was free to set a standard of negligence for liability of publishers in defamation actions brought by private citizens, and that Michigan must require, as a matter of federal law, that the plaintiff bear the burden of proving falsity. The Supreme Court was silent as to whether falsity needed to be proved by clear and convincing evidence or merely a preponderance of the evidence.

B. Trial and Verdict

After remand, trial commenced in Calhoun County, Michigan, Circuit Court, in February of 1988.

Testimony at trial revealed that Rouch was now 52 years old, had worked for General Foods for 23 years and had lived at the same address for 13 years. Tr. 122-123. His sons, who were 16 and 14 at the time of their father's arrest, testified that they were confronted by classmates at school after the article was published and were submitted to laughing and taunting from their classmates. Tr. 343-354, 368-374. The children were asked by classmates if they witnessed their father raping the babysitter, as the article had claimed. Tr. 354, 374.

Other witnesses testified that upon reading the article of December 22nd they had concluded that Rouch had committed the offense. One witness, Diane Laird, testified that "the fact that they publicly accused this man, I just was sure

they couldn't go that far without it being so . . . ." Tr. 416. Charles Anderson testified that he figured Rouch "must have done it." Tr. 497. Witnesses testified that they refused to allow their children to associate with the plaintiff's children, that they wondered why "that bastard" was still loose in the community after committing this crime, and that they asked the Petitioner why he was not in jail. Tr. 407, 408, 498. Co-workers testified that women were uncomfortable working with Rouch after the article appeared and that his suspected guilt of this uncharged offense was a topic of conversation at the plant and caused cruel tricks to be played on Rouch. Tr. 362, 380, 494.

The plaintiff also presented expert testimony of a journalism professor, the late Clark Mollenhoff, who had been the recipient of the Pulitzer Prize for investigative journalism regarding his reporting on the Teamsters Union and Jimmy Hoffa. Tr. 196. Professor Mollenhoff testified that the employees of the *Enquirer* demonstrated negligence in the manner in which they reported Rouch's arrest and that the reporter, Kaufman, was a "puppet of the police" because "whatever the police told him went into the paper without any regard for whether he had rights to print that or not." Tr. 201. The defense presented Stan Kaufman and their own experts who rebutted the testimony of Mollenhoff.

Mollenhoff was critical of the press because in recent years he had seen some segments of the press "roll over the bodies and the reputations of people freely." Tr. 206.

At the conclusion of the evidence, counsel for the plaintiff argued to the jury that the article in question was false because it stated that Mr. Rouch had committed a crime that he did not commit, because it falsely claimed that charges were authorized by the prosecutor's office when they were not, because it falsely claimed that police had authorized release of the information to the newspaper when the police denied that and because it falsely claimed that Rouch had

been identified by his own children. Tr. 991-998. Counsel for the defendant argued to the jury that the article was not false, because it was an accurate depiction of what had occurred surrounding Rouch's arrest and an accurate depiction of the police records regarding Rouch's arrest. Tr. 1025, 1030-31 Counsel for defendant admitted the prosecutor's office issued no warrant charging Rouch with an offense, but claimed that the police "charged" Rouch. Tr. 1031. Defense counsel conceded Rouch was not identified by his children, but that the "inaccuracy" was not "material." Tr. 1036. He stated that the article was not "an accusation of rape" but a statement of an arrest. Tr. 1037-1038.

After argument of counsel, the jury was instructed, in guiding them as to whether statements in the article were false, to:

> interpret the words according to their ordinary and obvious meaning. You must give the words the fair and reasonable interpretation that an average reader would give them. You need not look at words used in the article according to any technical or legal definition. Whether the statements in the article were false is for you to decide after considering the statements in the article, in the light of all the evidence in the case. p. A-200.

The judge also instructed the jury that the plaintiff must prove that the false statements in the article were "materially false" and tended to harm the plaintiff's reputation. The Court explained that this element was the same as whether the article was "libelous." p. A-201. The trial judge instructed the jury that they:

> should consider the meaning of the article in deciding if it libeled the Plaintiff. The meaning of the article is that meaning which under the circum-

stances a reasonable person who read the article reasonably understands to be the meaning intended. *Id.*

The jury was given a special verdict form which it returned with a finding that the allegations in the article were "materially false." p. A-197. On February 19, 1988, the jury returned a verdict for the plaintiff in the sum of $1,000,000.00. A judgment was entered in favor of the plaintiff against the defendants in that amount with statutory costs and interest on February 29, 1988. p. A-150.

C. Post-Trial Proceedings

On April 18, 1988, the trial judge denied the defendant's motion for judgment n.o.v. and for new trial, with an order entered April 28, 1988. The trial judge stated that it was clear, as a matter of law, that the jury could find that there was material falsity in the article. In its appeal to the Michigan Court of Appeals after the verdict, the defendant argued that the plaintiff failed to overcome the "Constitutional defense of truth." p. A-215. The Michigan Court of Appeals, in an opinion on June 4, 1990, affirmed the trial court's denial of motion for judgment n.o.v. and for new trial and affirmed the jury's verdict. The appeals court rejected any federal constitutional bars to the jury's verdict. The majority held that the plaintiff met his burden of proving falsity by proving that the defendant had falsely reported that plaintiff had been charged with criminal sexual conduct and that his own children had identified him as a rapist. Judge Allen dissented, arguing that the Plaintiff had not carried his burden of proof that the statements in the *Enquirer* article were materially false.

The Defendant then sought leave to appeal to the Michigan Supreme Court, and when leave was granted, argued that the Plaintiff "failed to prove that the article was materially false and failed to overcome the First Amendment." p. A-217. The Supreme Court reversed the Court of Appeals and the jury on July 15, 1992, basing its decision on the First Amendment of the United States Constitution. p. A-10. The Court held the

First Amendment compelled independent judicial review of defamation verdicts, and held that evidence of falsity in defamation cases must be sufficient to prove "material falsity." The majority of the court accepted the defendant's theory of the meaning of the article and of the meaning of the word "charged," finding that the article was not an accusation of a crime but a story of an arrest, and finding that the use of the word "charge" was not materially false since the police "charged" the plaintiff by virtue of his arrest. Since the prosecution concurred in the arrest of Rouch, it had authorized the arrest, the court said. The misidentification of plaintiff's children was not a sufficient inaccuracy to overcome First Amendment "breathing room" for falsity.

Chief Justice Cavanagh and Justice Levin dissented, arguing that in libel cases an appellate court should not review credibility determinations, disregard previous fact findings or create new fact findings. Rather, those justices believed that the court should exercise its independent judgment whether, as a matter of law, the evidence in the record supports the verdict. Since the jury returned a special verdict finding material falsity as it affected the average reader, and since independent review discloses sufficient evidence to support the jury's verdict, Justices Cavanagh and Levin would have affirmed the verdict.

Justice Cavanagh and Justice Levin both agreed that the evidence was sufficient to sustain the jury's special verdict of "materially falsity," but those Justices agreed as to the meaning to be afforded to the term "charged."

The majority opinion did not discuss what deference, if any, an appellate court must provide to a jury's verdict, what standard of proof the plaintiff must comply with in presenting evidence of falsity, or when evidence of falsity is insufficient, as a matter of law, to sustain a verdict for the plaintiff. On August 24, 1992, the Supreme Court denied rehearing of its opinion of July 15, 1992.

REASONS FOR GRANTING THE WRIT

I.

A STATE APPELLATE COURT IN A PRIVATE-FIGURE DEFAMATION CASE IS NOT COMPELLED BY THE FIRST AMENDMENT TO REVIEW THE ENTIRE RECORD *DE NOVO* AND SUBSTITUTE ITS JUDGMENT FOR THAT OF THE JURY, WHERE THE JURY'S SPECIAL VERDICT OF MATERIAL FALSITY IS SUPPORTED BY COMPETENT EVIDENCE.

The right of citizens to speak freely on matters of public concern and to criticize official conduct must be jealously guarded and protected. The First Amendment of the Constitution "delimits a state's power to award damages for libel in actions brought by private officials against critics of their official conduct." *New York Times* v. *Sullivan*, 376 U.S. 254, 283 (1964). We must also protect the right of our citizens to live life free from damaging falsehoods and to seek redress for injuries which occur when those falsehoods are negligently published. "The individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty.'" *Gertz* v. *Welch*, p. 341, quoting *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966).

This Court, in its decisions delineating the applicability of protections of the First Amendment to the requirements of proof in state defamation cases, has distinguished between cases where the plaintiff was a public figure and cases where the plaintiff was a private citizen. Because the First Amendment protects "uninhibited, robust and wide-open" debate about matters of public concern and criticism of official conduct, a public figure who is a plaintiff in a defamation action must not only meet the common law burden of proving falsity of published facts, he or she must also prove "actual

malice" as part of the burden of proof. The protections of the First Amendment require:

> [A] federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not. (*New York Times* v. *Sullivan*, pp. 279-280)

This federal rule is not applicable to defamation actions brought by private citizens. Private citizens, unlike public figures, are not required to prove "actual malice" but must only show fault amounting to at least negligence, for publishing a false and defamatory statement about a private citizen. "The state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to private citizens who bring defamation actions." *Gertz*, p. 343. Private citizens are at a greater disadvantage than public figures because:

> Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. p. 344.

States, "so long as they do not impose liability without fault ... may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[3] p. 347.

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[3] **The Michigan Supreme Court has held that in Michigan negligence is the applicable standard of fault for determining liability of a publisher. Malice on the part of the defendant need not be shown in a private-figure defamation case in Michigan. *Rouch* v. *Enquirer and News*, 427 Mich. 157, 398 N.W.2d 245 (1986), p. A-83. (The pre-trial decision in this case)**

In order to further protect and preserve the protections that the First Amendment provides to criticisms of public conduct, a second federal rule is required in public-figure defamation cases: the requirement of independent judicial review for evidence of malice and a standard by which evidence of malice needs to be proved — clear and convincing evidence:

> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositers of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice." *Bose* v. *Consumers Union*, p. 511.

Although the majority opinion in *Bose* used broad language about the federal rule for independent judicial review of cases in which First Amendment protections are involved, *de novo* review of the "entire" record was not required. *Bose*, p. 514, n. 1. The holding of the case was simply:

> that the clearly-erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times* v. *Sullivan*. Appellate judges in such a case must exercise independent judgment in determining whether the record establishes actual malice with convincing clarity." p. 514.

Philadelphia Newspapers v. *Hepps* defined the burden of proof for a private-figure libel plaintiff. The First Amendment requires that a private-figure plaintiff must bear the burden of proving falsity in a defamation action. Although the Court's

opinion in *Bose* had stated "there is a significant difference between proof of actual malice and mere proof of falsity . . .," *Bose*, p. 511 (footnote omitted), the court in *Hepps* was silent as to how the burden of proof of falsity must be carried, whether by a preponderance of the evidence, by clear and convincing evidence, or by some other standard. *Hepps* was also silent as to the standard of review to be applied to reviewing evidence of falsity.

In *Harte-Hanks Communications, Inc.* v. *Connaughton*, this Court reviewed a jury verdict in favor of a public-official plaintiff in a defamation action and, in remarks contained in a plurality of opinions, found the appellate court's review of juror determinations of falsity Constitutionally adequate; however, no standard was clearly articulated for review of findings of facts by jurors in defamation actions. The Sixth Circuit Court of Appeals had reviewed a jury's special verdict that an article was false by the clearly-erroneous standard. p. 662. The petitioner had suggested to this Court that one error of the Sixth Circuit was the failure of the court to review *de novo* the entire record and instead to rely on the subsidiary findings of the jury. p. 664. The question before this Court was viewed as one of whether the record in a defamation case was sufficient to support a finding of actual malice. p. 685. This question, the court said, is a question of Constitutional law. The court accepted, however, the doctrine that credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the opportunity to observe the demeanor of the witnesses, and found that the court must examine for itself the statements in issue and the circumstances under which they were made to see whether they are of a character which the principles of the First Amendment protect. p. 688. The court, as it had in *Bose*, disdained *de novo* review of the entire record and concluded that a proper standard for review of a jury's verdict is what testimony the jury must have accepted or rejected, not on what grounds it *may* have based its verdict. A concurring

opinion by Justice White, with whom the Chief Justice joined, argued that historical facts, such as who did what to whom and when, are reviewable only under the clearly-erroneous standard. Justice Scalia suggested that a reviewing court must always review the evidence to determine what a jury "could reasonably" have found. pp. 697-698. Justice Scalia concurred on the grounds that the court's opinion was correct in providing "deference to jury findings." Justice Scalia would have adopted the Sixth Circuit's analysis, which is that independent assessment of whether malice was clearly and convincingly proved should be made on the assumption that the jury made all the supportive findings that it reasonably *could have made*.

All of these cases left unanswered the question of the standard of review of a jury's finding of falsity in a private-figure defamation case.

In the absence of an answer to that question, federal and state appellate courts have, with the exception of Michigan, reviewed findings of falsity in private-figure cases or public-figure cases with some deference to jury findings where the facts are contested at trial as to the truth or falsity of the allegations, and federal and state courts have limited independent judicial review to the existence of malice in public figure cases.

See, *Levine* v. *CMP Publications, Inc.*, 738 F.2d 660 (5th Cir., 1984), (the issue of truth or falsity in a private-figure libel case which had been brought under Texas law was a question of fact for the jury or fact-finder and should not be subject to the appellate review mandated by *Bose* for constitutional facts, such as actual malice; *Newton* v. *National Broadcasting Co., Inc.*, 930 F.2d 662 (9th Cir., 1990), *cert. den.*, 112 S. Ct. 192 (1991), (the Court assumed the plaintiff had proved falsity of the allegations, and reviewed the judgment independently only as to questions of actual malice);

Bartimo v. *Horseman's Benevolent and Protective Assn.*, 774 F.2d 894 (5th Cir., 1985), *cert. den.*, 475 U.S. 1119 (1986), (the independent judicial review in a libel case is limited to the constitutionally mandated element of malice); *Nor-West Communications* v. *City of St. Paul*, 924 F.2d 741 (8th Cir., 1991) (*Bose* standard of independent judicial review not applicable to a court's finding of absence of standing which finding may be reviewed under the "clearly erroneous" standard); *Starkins* v. *Bateman*, 150 Ariz. 537, 724 P.2d 1206 (1986) (independent appellate review of a jury verdict is limited to the existence of malice in a public-figure libel case involving a non-media defendant); *Brown* v. *K & D. Corp.*, 205 Conn. 8, 529 A.2d 1292 (1987) (a jury verdict in favor of a defendant in a libel action does not require independent judicial review, because such review is only required when a defamation action has been brought by a public official). Some of these courts have noted the absence of guidance as to whether the *Bose* standard of independent judicial review for actual malice applies to the review of questions of falsity. See *Levine*, footnote 19, pp. 672-673, and *Newton*, footnote 7, p. 669.

Nowhere has the confusion of the appellate courts as to the proper standard of review of juror findings of falsity been more adequately demonstrated than in the multiple opinions in the District of Columbia Circuit in *Tavolareas* v. *Piro*, 759 F.2d 90 (D.C. Cir., 1985), and *Tavolareas* v. *Piro*, *en banc*, 817 F.2d 762 (D.C. Cir., 1987), *cert. den.*, 484 U.S. 870 (1987). In the first opinion, a panel opinion, the majority would have held that *Bose* does not require that any factual determination other than the "ultimate conclusion" needs to be independently reviewed, with a dissenting judge urging the court to hold that *Bose* requires a *de novo* review of the entire record in defamation cases. 759 F.2d 108. In the *en banc* opinion, the majority of the court reviewed the evidence for actual malice, found actual malice did not exist, but refused to go as far as the panel in interpreting *Bose*, with a concurring opinion by the Chief Justice chastising the court for

avoiding the opportunity to articulate a standard of review for questions of falsity, and a dissenting opinion again urging that the *Bose* standard should be adopted for the review of all factual determinations in libel actions.

The Michigan Supreme Court, in the decision from which this Petition for Certiorari is being sought, has gone farther than *Bose* or *Harte-Hanks* require and farther than other federal and state appellate courts known to the Petitioner in establishing a Constitutionally-based standard for *de novo* appellate review of the entire record to review evidence of all factual findings of falsity in private-figure libel verdicts. The Michigan Supreme Court interpreted *Bose* as requiring independent judicial review *de novo* of the entire record for material falsity in private-figure libel verdicts, despite the fact that *Bose* explicitly states there is no such requirement of *de novo* review of all the evidence, as pointed out by dissenting Justice Cavanagh, who urged the court not to adopt this new, expansive federal standard for review of evidence in defamation cases, but to afford some deference to a jury verdict. This constitutionally compelled standard of *de novo* review of all the evidence permitted the Michigan Supreme Court to give its own meaning to disputed factual statements and to determine whether they, instead of the jury, as an average reader, read the statements in the disputed article to be materially false. The members of the court all conceded that the statements were false, but used the doctrine of *de novo* review to find that the falsity was not material.

The Michigan Supreme Court, in cases other than defamation cases, adheres to the clear error standard for review of findings of the trial court sitting without a jury. See, e.g., *Poirier* v. *Grand Blanc Township* (*Aft. Rem.*), 192 Mich. App. 539, 548, ___ N.W.2d ___ (1992). And Michigan adheres to the standard that a jury's verdict should not be set aside if there is competent evidence to support it because the trial court cannot substitute its judgment for that of the fact finder. See,

e.g., *King* v. *Taylor Chrysler-Plymouth, Inc.*, 184 Mich. App. 204, 210, 457 N.W.2d 42 (1990). The Michigan Supreme Court, prior to the decision in the instant case, had even adhered to a different standard of review of a jury's verdict in a defamation case, holding that a jury's verdict should be reviewed for evidence of falsity as to whether the jury's verdict is against the great weight of the evidence. *Locricchio* v. *Evening News Assn.*, *supra*.

By setting a *de novo* standard of review of all evidence in defamation cases brought by private figures that affords no deference to a jury's findings, the Michigan Supreme Court has effectively nullified jury findings, and all factual questions in defamation cases in Michigan will be tried *de novo* in appellate courts. Such nullification of jury findings was not contemplated by the framers of our Constitution in the name of free speech. The private plaintiff, who in today's world is at a great disadvantage in facing powerful media defendants, has an insurmountable burden when his or her reputation is damaged by the publication of patently false allegations. See, Bollinger, *Images of a Free Press*, U. of Chicago Press (1991).

Unless this Court grants this Petition for Certiorari and clarifies that the standard of review in defamation cases brought by private figures requires some deference to jury findings of fact, preservation of the common law right of action for defamation in the State of Michigan will be lost, preservation of the scope of a jury's province as fact finder will be abandoned in defamation cases in Michigan, and Michigan will be applying a federal rule it has created that no federal or state appellate courts seem to apply. This rule is not compelled by the First Amendment, and should not be applied to set aside a jury's verdict which is supported by competent evidence.

II.

THE EVIDENCE OF FALSE STATEMENTS PRINTED BY THE PUBLISHER, WHICH INCLUDED FALSE ACCUSATIONS OF A CRIME THAT PLAINTIFF DID NOT COMMIT. FALSE ACCOUNTS OF POLICE INFORMATION, AND A FALSE STATEMENT THAT THE PLAINTIFF HAD BEEN CHARGED WITH A CRIME, WAS SUFFICIENT, AS A MATTER OF LAW, TO CARRY THE BURDEN OF PROOF OF MATERIAL FALSITY SO AS TO OVERCOME THE FIRST AMENDMENT PROTECTIONS OF A PUBLISHER IN A DEFAMATION ACTION.

Falsity within the context of a defamation action is not absolute, for the First Amendment protects some degree of falsity. *Philadelphia Newspapers* v. *Hepps*. This Court has accepted the common law definition of falsity within the context of a public figure libel action: a statement is not considered false unless it "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Masson* v. *New Yorker*, 501 U.S. ___, 111 S. Ct. 2419 (1991) *Masson* held that false quotations published by the defendant had the degree of falsity required to present a jury question of actual malice so as to withstand a motion for summary judgment. This Court did not consider the standard for appellate review of juror findings of falsity in private figure cases.

In *Philadelphia Newspapers* v. *Hepps*, this Court held that the Plaintiff had *the burden* of proof, but did not extend the *Bose* requirement that falsity, like malice, needs to be proved by "clear and convincing evidence." In *Harte-Hanks*, this Court did not clarify the standard of sufficiency for a jury's special verdict of falsity in public-figure cases where malice is required and was silent as to the standard of sufficiency of evidence of falsity in private-figure cases.

The Michigan Supreme Court, in the case sought to be reviewed, did not articulate any standard by which the suffi-

ciency of the evidence of falsity is reviewed for "material falsity" — clear and convincing evidence, a preponderance of the evidence, evidence from which a jury could reasonably conclude, etc. The court simply suggested that the First Amendment permitted it to substitute its judgment for that of the jury without articulating any standard of review of the sufficiency of the evidence required by the First Amendment. The court abandoned a "great weight of the evidence" test for Constitutional review of a jury verdict in a defamation case that it had accepted only last year in *Locricchio* v. *Evening News Assn.*, *supra*

The question of the standard by which falsity needs to be proved to strip away the protection of the First Amendment is a thorny question which is unanwered by this Court. In the absence of a clear articulation of a Constitutionally-based standard of sufficiency, the federal and state appellate courts have been attempting to articulate their own standard. See cases at pp. 17-19 of this Petition. The Michigan Supreme Court is the only court petitioner is aware of that permits an appellate court to substitute its judgment for that of the jury without articulating any standard for review of the sufficiency of the evidence or without providing any deference to the jury's finding of "material falsity."

It is difficult to envision a case where the plaintiff's proof of falsity of the allegations would not be more sufficient to overcome First Amendment protections than the Plaintiff's proof in this case. The Defendant conceded that the article published about the Plaintiff was false when it claimed that rape charges against the Plaintiff had been authorized by the prosecutor's office and when it stated that the Defendant had been identified as a rapist by his own children. Tr. 1031, 1036.

It is also difficult to argue that the jury's finding of material falsity in this case should be afforded no deference in determining Constitutional sufficiency of the evidence of

material falsity. The question of "material falsity" was joined at trial before the jury as a question as to whether the article could be viewed as a fair story of an arrest or whether the article was an accusation that Mr. Rouch had, indeed, committed the crime he was charged with and the acts mentioned in the article. It was not disputed that Mr. Rouch did not commit the offense of which the article accused him. The Plaintiff presented numerous witnesses who testified that the meaning of the article to them was that the Plaintiff had committed the offense charged, done terrible things, and would be going to jail. The jury, in reviewing the article and its meaning, was properly instructed to view it as an average reader in the context of the entire article. pp. A-200-202. The jury's special verdict finding the article "materially false" has abundant evidence underpinning the verdict, is not an irrational determination, and is not against the great weight of the evidence.

There were also credibility questions brought before the jury in the instant case. The reporter, Stan Kaufman, claimed, unequivocally, that he received authorization to publish the information from the Bedford Township Police Department, either Officer Minier or Chief Bell. Both Chief Bell and Officer Minier categorically denied ever talking to the reporter or providing any information about the plaintiff to any member of the press. Both testified that it is the policy of the Bedford Township Police Department not to release any information concerning a person who has been arrested before formal charges are filed.

The petitioner suggests that where evidence establishes clear falsity of allegations in a publication, where there are credibility questions involving the witnesses, and where there are factual interpretations to be decided as to the meaning of statements to the average reader, a jury's decision that false statements and inaccuracies are "materially false" for the purpose of a defamation action brought by a private

citizen is a special verdict that should not be set aside on appeal when there is evidence from which a jury could reasonably conclude that published statements were materially false and when the finding is not clearly erroneous. The First Amendment establishes no rule of "sufficiency of evidence of falsity" that required the verdict to be set aside in this case.

CONCLUSION

In a dissenting opinion in *Bose*, Chief Justice Rehnquist joined by Justice O'Connor noted that the purpose of independent review was not to allow an appellate court to place its thumb on the scales in favor of the party claiming a constitutional right, but to allow perceived shortcomings of the trier of fact, by way of bias or some other factor, to be compensated for. p. 518. The dissent expressed its concern as to whether independent judicial review might bring about "less confidence in the judgments of lower courts and more entirely fact bound appeals." p. 520. The Michigan Supreme Court has caused this warning to come true.

This Court has stated that it is "through the course of case-by-case adjudication" that it can "give content to . . . otherwise elusive constitutional standards." *Harte-Hanks*, p. 686. Such elucidation "is particularly important in the area of free speech . . ." *Id.*

This case presents an instance where, through the course of case-by-case adjudication, this Court can give meaning to the Constitutional standard to be applied for appellate review of private-figure libel verdicts against media defendants and give meaning to the Constitutional standard by which the sufficiency of the evidence of material falsity is to be judged by the appellate courts in reviewing the findings of the trier of

fact. Both standards are ripe to be decided and are well presented by this case.

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Michigan.

Respectfully submitted,

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